IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.2331 OF 2005

Betul Oils & Flours Limited ...Petitioner

vs.

M/s.Chandulal Rameshwardas
Exports Ltd. & Ors. ...Respondents

Mr.Subhash Jha i/b M/s.Law Global for the Petitioner
Mr.Girish Kulkarni for the Respondent No.1
Ms M.H.Mhatre,A.P.P. for State

CORAM: A.S.OKA,J.
DATE : OCTOBER 14,2005

P.C.:

1. On the last date the Writ Petition was taken up for final disposal with the consent of the Counsel appearing for the parties.

2. The challenge in this Writ Petition filed under Article 227 of Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 is to the Judgment and Order dated 20th September 2005 passed by the learned Special Metropolitan Magistrate, Mumbai. The application made by the Petitioner for recall of Prosecution Witness No.1 and/or the Defence Witness No.1 and for admission of documents under Section 294 of the Code of Criminal Procedure, 1973 was rejected by the impugned order.

3. The Petitioner is the complainant in a private complaint

under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act of 1881). The application on which the impugned order has been passed was made by the Petitioner after the defence evidence was recorded. The prayer in this Petition is for recalling P.W.No.1 for the purposes of proof of documents marked as X-1 to X-12. The prayer made in the alternative is that D.W.No.1 be recalled for further cross examination on the said documents and the last prayer is for directing the Respondent Nos.1 to 3 to admit the documents under Section 294 of the said Code.

4. The learned Counsel for the Petitioner submitted that the Examination-in-chief of P.W.No.1 was recorded for a period spanning over about four months. Though the documents in question were allowed to be produced and formal proof of those documents remained to be recorded. He submitted that there is no attempt to fill in the lacuna and therefore power under section 311 of the said Code ought to have been exercised.

5. The learned Counsel for the Respondent Nos.1 to 3 opposed the Petition by pointing out that the documents on the basis of which the application has been made are only copies of the original documents. He submitted that as no foundation is made for leading the secondary evidence, no purpose will be served by allowing the application. The Counsel appearing for

the parties have placed reliance on various decisions of the Apex Court and this Court.

6. I have considered the submissions. It will be necessary to refer to the decision of the Apex Court reported in (1999) 6 S.C.C. page 110 (Rajendra Prasad vs. Narcotic Cell). The Apex Court in the said decision has considered the scope of Section 311 of the said Code. The Apex court held that oversight or mistake during conducting the case cannot be understood as lacuna. The Apex Court held that a lacuna is the inherent weakness or a latent wedge in the matrix of the prosecution case and the mistake while conducting the case cannot be equated with a lacuna. In paragraph 12 of the said decision the Apex Court held thus :

"12. **We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, no can the power be whittled down merely on the ground that the prosecution discovered latches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just**

> **decision.** The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at."(Emphasis supplied)

7. It must be noted here that the Apex Court was dealing with the case under Narcotic Drugs and Psychotrophic Substances Act, 1985. In the present case the complaint is under Section 138 of the said Act of 1881. As held by the Apex Court in case of Dalmia Cement (Bharat) Ltd. Vs. Galaxy Traders & Agencies Ltd. & Others, reported in (2001) 6 S.C.C. page 463, by a legal fiction, section 138 makes a civil transaction to be an offence.

8. In my view failure to get the documents proved from P.W.No.1 cannot be termed as a lacuna in the prosecution case. It is true that most of the documents appeared to be copies of the original. However, a foundation can made in the evidence for leading secondary evidence and parties can be always be permitted to lead secondary evidence. In my view, the learned Trial Judge ought to have granted limited prayer for recalling the P.W.No.1. Therefore, Petition deserves to be allowed in part.

9. Accordingly I pass the following order :

i) Impugned Judgment and Order dated 20th September 2005 is quashed and set aside. Application dated 14th September 2005 made by the Petitioner is partly allowed. The Petitioner is permitted to recall the P.W.No.1 only for a limited purpose of proving the documents which are referred to in the application.

ii) It will be open for the Respondent Nos.1 to 3 to further cross examine of the P.W.No.1. It will be also open for the Respondent Nos.1 to 3 to recall other Prosecution Witnesses for further cross examination and to lead further defence evidence, if any.

iii) All contentions of the parties on merits are kept open.

iv) The parties and the concerned Court to act upon an authenticated copy of the order.

JUDGE